

## **IMPLEMENTING AGREEMENT**

**between**

**MAGIC CARPET WOODS ASSOCIATION and**

**U.S. FISH AND WILDLIFE SERVICE**

**TO ESTABLISH A MITIGATION PROGRAM FOR ENDANGERED SPECIES AT THE MAGIC CARPET WOODS PROPERTY IN THE EAST HALF OF SOUTHWEST QUARTER AND WEST HALF OF SOUTHEAST QUARTER OF SECTION 14, TOWNSHIP 32 NORTH, RANGE 11 WEST, LEELANAU TOWNSHIP, MICHIGAN.**

This Implementing Agreement ("Agreement"), made and entered into as of the 15 day of May, 2001, between MAGIC CARPET WOODS ASSOCIATION and the UNITED STATES FISH AND WILDLIFE SERVICE (FWS) (the Service), hereinafter collectively called the "Parties," defines the Parties' roles and responsibilities and provides a common understanding of action that will be undertaken to minimize and mitigate the effects on the subject listed and unlisted species and their habitats of the residential use of the Magic Carpet Woods Property.

### **1.0 RECITALS**

This Agreement is entered into with regard to the following facts:

**WHEREAS**, the proposed Magic Carpet Woods Property, specifically the beachfront area, has been determined to be potential habitat for the federally listed piping plover; and

**WHEREAS**, the proposed Magic Carpet Woods Property also has been determined to be habitat for the Pitcher's thistle, a federally listed plant species, and the Pumpelly's brome grass and showy orchis, a state listed threatened species, and the fir clubmoss, a state species of special concern; and

**WHEREAS**, Magic Carpet Woods Association, with technical assistance from the Service, has developed a series of measures, described in the Habitat Conservation Plan, to minimize and mitigate the effects of the proposed residential development upon the subject listed species and their associated habitats; and

**THEREFORE**, the Parties hereto do hereby understand and agree as follows:

## **2.0 DEFINITIONS**

The following terms as used in this Agreement shall have the meanings set forth below:

- 2.1** The term "Permit" shall mean an incidental take permit issued by the Service to Magic Carpet Woods Association pursuant to Section 10(a)(1)(B) of the Endangered Species Act (ESA).

The term "Permit Area" shall mean the Magic Carpet Woods Association area consisting of approximately 91 acres in the East Half of Southwest Quarter and West Half of Southeast Quarter of Section 14, Township 32 North, Range 11 West in Michigan as depicted in the Habitat Conservation Plan.

The term "Permittee" shall mean Magic Carpet Woods Association

The term "Conservation Plan" shall mean the Habitat Conservation Plan prepared for the Magic Carpet Woods residential Property.

The term "Plan Species" shall mean species adequately covered in the HCP and identified in Section 1.0 of this Agreement.

- 2.6** The term "changed circumstances" means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and the Service and that can be planned for (*e.g.*, the listing of new species, or a fire or other natural catastrophic event in areas prone to such events). The term is intended to have the same meaning as used in the No Surprises Rule promulgated at 63 Fed. Reg. 8859 (Feb. 23, 1998).

- 2.7** The term "unforeseen circumstances" means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by the plan developers and the Service at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse change in the status of the covered species. The term is intended to have the same meaning as used in the No Surprises Rule promulgated at 63 Fed. Reg. 8859 (Feb. 23, 1998).

## **3.0 HABITAT CONSERVATION PLAN**

Pursuant to the provisions of Section 10(a)(1)(B) of the ESA, Magic Carpet Woods Association, hereinafter referred to as Permittee, has prepared a Habitat

Conservation Plan (HCP) and submitted it to the Service with a request that the Service issue a Permit (Permit) to allow subject Plan Species to be incidentally taken within the Permit Area as depicted and described in the HCP. The HCP proposes a mitigation program for the subject Plan Species and their habitats.

#### **4.0 INCORPORATION OF HCP**

The HCP and each of its provisions are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the HCP and Permit, the terms of the Permit shall control. In all other cases, the terms of this Agreement and the terms of the HCP shall be interpreted to be supplementary to each other.

#### **5.0 LEGAL REQUIREMENTS**

In order to fulfill the requirements that will allow the Service to issue the Permit, the HCP sets forth measures that are intended to ensure that any take occurring within the Permit Area will be incidental; that the impacts of the take will, to the maximum extent practicable, be minimized and mitigated; that procedures to deal with unforeseen circumstances will be provided; that adequate funding for the HCP will be provided; and that the take will not appreciably reduce the likelihood of the survival and recovery of the Plan Species in the wild. It also includes measures that have been suggested by the Service as being necessary or appropriate for purposes of the HCP.

#### **6.0 TERMS USED**

Terms defined and utilized in the HCP and the ESA shall have the same meaning when utilized in this Agreement, except as specifically noted.

#### **7.0 PURPOSES**

The purposes of this Agreement are:

- 7.1** To ensure implementation of each of the terms of the HCP;
- 7.2** To describe remedies and recourse should any Party fail to perform its obligations, responsibilities, and tasks as set forth in this Agreement; and
- 7.3** As stated in paragraph 12.3.a hereof, to provide assurances to the Permittee that as long as the terms of the HCP and the Permit issued pursuant to the HCP and this Agreement are fully and faithfully performed, no additional mitigation will be required except as provided for in this Agreement or required by law.

## **TERM**

- 8.1** Stated Term. This Agreement shall become effective on the date that the Service issues the Permit requested in the HCP and shall remain in full force and effect for a period of 25 years or until termination of the Permit, whichever occurs sooner.

## **9.0 FUNDING**

- 9.1** Permittee will provide such funds as may be necessary to carry out its obligations under the HCP. The Permittee should notify the Service, if the Permittee's funding resources have materially changed, including a discussion of the nature of the change, from the information provided in the HCP.
- 9.2** In addition, the Permittee will contribute \$1,000 (not to exceed \$13,000) at the time each of the 13 lots is first sold or ownership is transferred. These monies will be invested in a trust account, with the balance and income from the trust account to be used to fund piping plover research, monitoring, or recovery efforts conducted in the Great Lakes region. The trust proceeds will be forwarded to a qualifying educational or charitable institution mutually agreed to by the Association and the Service. The Service shall approve all funded projects or use of funds.

## **RESPONSIBILITIES OF THE PARTIES IN MITIGATION PROGRAM IMPLEMENTATION AND MONITORING RESPONSIBILITIES OF THE PERMITTEE**

### **10.1 RESPONSIBILITIES OF THE PERMITTEE**

- a. The HCP will be properly functioning if the terms of the Agreement have been or are being fully implemented.
- b. The Permittee shall undertake all activities set forth in the HCP in order to meet the terms of the HCP and comply with the Permit.
  - (1) The Permittee shall take the following steps in the event of non-compliance by members, lessees or guests:
    - (i) Incidents of non-compliance by members, lessees or guests will result in an initial verbal alert by the Association.

- (ii) The Association will notify the Service promptly when non-compliance continues after the initial verbal alert.
- c. The Permittee shall submit an annual report describing its activities and an analysis of whether the terms of the HCP were met for the reporting period. The report shall provide all reasonably available data regarding listed species presence, activity, and any incidental take on the Magic Carpet Woods' property, and where requested by the Service, changes to the overall population of Plan Species that occurred in the Permit area during the reporting period. The report shall also include the following certification from a responsible Permittee official who supervised or directed the preparation of the report: "Under penalty of law, I certify that, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this report, the information submitted is true, accurate, and complete".

#### **RESPONSIBILITIES OF THE SERVICE**

- a. The Service shall cooperate and provide, to the extent funding is available, technical assistance to the Permittee as described in the HCP. Nothing in this Agreement shall require the Service to act in a manner contrary to the requirements of the Anti-Deficiency Act.
- b. After issuance of the Permit, the Service shall monitor the implementation thereof, including each of the terms of this Agreement and the HCP in order to ensure compliance with the Permit, the HCP, and this Agreement.

### **11.0 REMEDIES AND ENFORCEMENT**

#### **REMEDIES IN GENERAL**

Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permit, and the HCP, and to seek remedies for any breach hereof, subject to the following:

- a. **NO MONETARY DAMAGES**

No Party shall be liable in damages to any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement. Notwithstanding the foregoing:

#### Retain Liability

All Parties shall retain whatever liability they would possess for their present and future acts or failure to act without existence of this Agreement.

#### Land Owner Liability

All Parties shall retain whatever liability they possess as an owner of interests in land.

#### Responsibility of the United States

Nothing contained in this Agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA.

b. INJUNCTIVE AND TEMPORARY RELIEF

The Parties acknowledge that the Plan Species are unique and that their loss as species would result in irreparable damage to the environment and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.

### **11.2 THE PERMIT**

a. SEVERABILITY

Severability provisions are not applicable because the Incidental Take Permit is issued to the Association, not to individual members or property owners.

b. PERMIT SUSPENSION OR REVOCATION

Except as otherwise provided for under the terms of the Agreement, the Permit shall be suspended or revoked in conformance with the provisions of 50 CFR 13.27 through 13.29 (1999), as the same exists as of the date hereof.

## **LIMITATIONS AND EXTENT OF ENFORCEABILITY**

### **a     NO SURPRISES RULE**

Subject to the availability of appropriated funds as provided in Paragraph 13.6 hereof, and except as otherwise required by law, no further mitigation for the effects of the proposed Magic Carpet Woods residential development upon the Plan Species may be required from the Permittee that has otherwise abided by the terms of the HCP, except in the event of unforeseen circumstances; provided that any such additional measures may not require additional land use restrictions or financial compensation from the Permittee without its written consent.

### **b.    PRIVATE PROPERTY RIGHTS AND LEGAL AUTHORITIES UNAFFECTED**

Except as otherwise specifically provided herein, nothing in this Agreement shall be deemed to restrict the rights of the Permittee to the use or development of those lands, or interests in lands, constituting the Permit Area; provided, that nothing in this Agreement shall absolve the Permittee from such other limitations as may apply to such lands, or interests in lands, under other laws of the United States and the State of Michigan.

## **12.0   AMENDMENTS**

Except as otherwise set forth herein, this Agreement may be amended consistent with the ESA and with the written consent of each of the Parties hereto.

## **13.0   MISCELLANEOUS PROVISIONS**

### **NO PARTNERSHIP**

Except as otherwise expressly set forth herein, neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

### **SUCCESSORS AND ASSIGNS**

This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties hereto and their respective successors and assigns.

## **NOTICE**

Any notice permitted or required by this Agreement shall be delivered personally to the persons set forth below or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows or at such other address as any Party may from time to time specify to the other Parties in writing:

- A     Assistant Regional Director, Ecological Services  
United States Fish and Wildlife Service  
Federal Bldg., 1 Federal Drive  
Ft. Snelling, MN 55111-4056
  
- B     Mr. Frank B. Petty  
Director  
Magic Carpet Woods Association  
311 Knollwood Drive  
Traverse City, MI 49686

## **ENTIRE AGREEMENT**

This Agreement, together with the HCP and the Permit, constitutes the entire Agreement between the Parties. It supersedes any and all other Agreements, either oral or in writing among the Parties with respect to the subject matter hereof and contains all of the covenants and Agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise or Agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

## **ELECTED OFFICIALS NOT TO BENEFIT**

No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

## **AVAILABILITY OF FUNDS**

Implementation of this Agreement and the HCP by the Services is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The parties acknowledge that the Services will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.



### **DUPLICATE ORIGINALS**

This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

### **THIRD-PARTY BENEFICIARIES**

Without limiting the applicability of the rights granted to the public pursuant to the provisions of 16 U.S.C. § 1540(g), this Agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or property damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing Federal or State law.

### **13.9 RELATIONSHIP TO THE ESA AND OTHER AUTHORITIES**

The terms of this Agreement shall be governed by and construed in accordance with the ESA and other applicable laws. In particular, nothing in this Agreement is intended to limit the authority of the Service to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Service as an agency of the Federal government.

### **REFERENCES TO REGULATIONS**

Any reference in this Agreement to the HCP, or the Permit to any regulation or rule of the Service shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.


### **13.11 APPLICABLE LAWS**

All activities undertaken pursuant to this Agreement, the HCP, or the Permit must be in compliance with all applicable State and Federal Laws and regulations.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date last signed below.

  
\_\_\_\_\_  
Regional Director  
United States Fish and Wildlife Service  
Fort Snelling, Minnesota

Date 3/21/01

  
\_\_\_\_\_  
Frank B. Petty  
Director  
Magic Carpet Woods Association  
Traverse City, Michigan

Date 3/15/01